THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, NOVEMBER 12, 1875. { Hon. JOHN F. DILLON Contributing Editor.

NATIONAL BANKS AND THE USURY LAWS.—We expected to present our readers this week with the text of the opinion of the Supreme Court of the United States, in the case of Farmers and Mechanics Bank v. Deering, which holds that the usury laws of New York are not applicable to the National Banks, and which overrules the decision of the New York Court of Appeals in the case of First National Bank of Whitehall v. Lamb; but although we sent for the opinion last week we did not receive it in time for this issue of the JOURNAL. We shall present it to our readers next week.

A Prize Awarded to an American at the Social Science Congress.

Some three years ago, Senor Don Arturo Marcoartu proposed two prizes, one of £200, and the other of £100, for the best essay on the question, "In what way ought an international assembly to be constituted for the formation of a code of international law, and what ought to be the leading principles on which such a code should be formed." The money was offered to the British Social Science Association, which accepted it, and caused the offer to be made known in different countries of Europe and America. Essays were to be sent in, at the option of the writers, in English, French or German, and a committee was appointed to decide on their merits, consisting of Mr. Westlake, Q. C., and two other London barristers, Mr. H. D. Jencken and Mr. E. Wendt. Thirty-six essays were handed in. The result of the competion was announced at the Congress of the Association which recently met at Brighton. The first prize was awarded to Mr. Abram Pulling Sprague, of New York, one of the editors of the Albany Law Journal, and the second to Mr. Paul Lacombe, a retired advocate of the French bar, who is now engaged in writing a history of France. The New York Tribune's correspondent states that Lord Aberdare, president of the Congress, delivered the prizes, each accompanied by an illuminated certificate, and proposed that the thanks of the Association should be given both to the donor of the prizes, and to the gentlemen who had won them. His speech assured the members that though Senor de Marcoartu was an enthusiast, he, Lord Aberdare, is of opinion that it is time for international law to begin its triumphs, and that the warlike period should be closed. "Nations," said Lord Aberdare—not perhaps without some thought of compliment to Mr. Sprague's nationality—"will only be secure when by universal opinion the moral greatness of a Washington is set above the intellectual superiority of a Napoleon." In congratulating the winners, Lord Aberdare expressed gracefully enough, a natural chagrin that neither of them should be English. But there has been fair play, which was the great thing, "and if prizes were to be won by strangers, we shall all feel satisfaction in the fact that the first prize has been accorded to a native of the great country so closely allied to us in blood and language, and that the second has fallen to a citizen of that nation which is our nearest neighbor, and which, so long regarded as a natural enemy, is now bound to us by ties of the closest amity and community of interests." Senor Marcoartu also delivered an eloquent address. The winning of the first prize by an American over so many competitors, furnishes a much more fitting occasion for indulging in a feeling of national pride, than the winning of an international rifle contest or base ball match; and tbe members of the profession of legal journalism should feel an especial pride that so high an honor has been achieved by one of their number.

Railway Mortgages and Mechanics' Liens.

Elsewhere we publish a decision of the Supreme Court of Iowa—Nelson v. Iowa Eastern Railway Co.—on a question which has assumed considerable importance, the right of preference between a railway mortgage bondholder and a mechanic or material-man who has contributed labor or materials to the building of the road. It will be seen that the court gives a preference to the bondholders, although the mortgage was made before the road was built, and hence was intended to cover property not in existence at the time of its execution. We are not familiar with the adjudications on this question, and presume there are but few in the books; but we have read this opinion several times, and are not satisfied with the conclusion it reaches, nor with some of the reasoning by which that conclusion is arrived at. The position taken by the plaintiffs' counsel, that where a mortgage is made to cover after-acquired property, the rights of the mortgagee in such property are subordinate to any liens or incumbrances which may subsist against it at the time it comes into the hands of the mortgagor—which appears to be a well-settled rule of equity—is not in our judgment satisfactorily answered by the court. Nor do we perceive much force in the position of the court that a specific lien could not be enforced against the ties because they were incapable of *removal* without destroying the railroad track. We can not see how it would hurt the road-bed, rails, or even the spikes, to unfasten and remove the ties from the track. It might cause a temporary obstruction to travel, and it might not. The thing is done every day. Old ties are constantly taken out, and new ones put in, on all railroads, and without the stoppage of any train. But even if this were not so, we do not see how an argument *ab inconvenienti* can be resorted to to annul the provisions of a statute as positive as section 1855 of the Iowa Code of 1860, under which a special lien was claimed, which reads as follows, and which, by the provisions of a subsequent statute, was extended to railroads: "The lien for the things aforesaid or work, shall attach to the buildings, erections or improvements for which they were furnished or the work was done, *in preference to any prior lien, or incumbrance, or mortgage* upon the land upon which said building, erections or improvements have been erected or put, and any person enforcing such lien may have such building, erection or improvement. sold under execution, and the purchaser may remove the same within a reasonable time thereafter." To illustrate this decision by an analogous case, suppose a land-owner should determine to build a house, and in order to secure the contractor, should

execute a mortgage upon the land and also upon the house thereafter to be built. Would the specific lien of a material-man who should furnish doors and windows for the house, against those doors and windows, be postponed to the mortgage of the contractor? Or would it not rather be held that the doors and windows entered the house encumbered with the material-man's special lien, which lien could not be divested by the attaching of a prior mortgage, made to cover them before they belonged to the mortgagor? Any other conclusion, it seems to us, smacks too much of taking one man's property away from him and giving it to another without compensation. At all events we doubt whether the Iowa decision will satisfy the common sense of practical men, or be regarded by them in any other light than as frittering away the benefits of a plain and positive statute, made to protect the mechanics and producers of the state, in behalf of bond-holders, who, whatever their rights may be, must be presumed to have purchased the secureties subject to any infirmities which might intervene under a general law of the state then existing, of which they were chargeable with notice. For a contrary view of this question, see Walker v. Miss. Val., etc., Ry. Co., 2 CENT. L. J. 481.

The Jury System.

We find the following in the Legal Gazette:

The CENTRAL LAW JOURNAL referring to the recent lynching and murder of the man Shell, in Ohio, by a mob of citizens, says: "Such law as that administered in this case is but one step better than no law at all, and finds its only justification in communities such as mining camps remote from civilization, where no other law can be invoked. And law administered by twelve unskilled men, played upon by cunning advocates, is but one step better." We are aware of the growing opposition to the system of trial by jury that is steadily creeping into the minds of the legal profession; but we were hardly prepared to hear it stated so strongly as this. We are not among the number of those who look with disfavor on juries and their verdicts. On the contrary, we think that in the majority of cases, substantial justice is better attained at their hands than would be reached by any other means whatever. Without wishing to enter for one moment upon the discussion of a subject which has been so frequently and thoroughly argued and considered, we desire to enter our protest against the comprehensive way our neighbor has of putting it.

Lest the strong language above quoted may induce others to misapprehend our views, we beg to say that we are not in favor of abolishing the jury system. We are, however, in favor of gradually introducing such reforms into the system as shall do away with the necessity of a unanimous verdict except where the verdict convicts an accused person of a capital offence, and also such as shall give judges greater control over them. We think that in most cases it should be made the duty of the judge in charging the jury to sum up the evidence and to advise the jury distinctly of his views as to the weight of it. The reason of this is that a skilled lawyer whose whole life has been addicted to the examination of witnesses is much more capable of penetrating motives and determining the value of testimony than twelve unskilled men. It is well known that in a very great number of cases, notably those where a woman or a corporation is a litigant, the verdicts of juries reflect only human weakness or popular prejudice, and turn the administration of justice into a roaring farce. Next to a trial by Athenian dicasts, or by a Roman or a Rocky Mountain mob, a trial by a jury under the system which obtains in Missouri—a system which obliges the judge first to instruct the jury, and then turns them over to the advocates who argue the facts and interpert these instructions as their cunning may suggest—is the most wretched and uncertain. It often happens in Missouri that the judge, after instructing the jury, sends them into another room in charge of an officer, where the attorneys argue the case before them. Where the judge thus abdicates his seat and abandons the control of the jury to the advocates, it is as impossible to tell in what direction the jury may drift, as it is to predict the direction of the flight of a herd of wild asses in a desert.

It is not among the legal profession alone that a growing feeling against the jury system, as at present constituted, is discernible. Within the past few years several influential lay journals have denounced the system and called for its abrogation. The strongest expressions of opinion on this subject which we have lately seen are found in an article in an recent number of that scholarly periodical, Scribner's Monthly. It is a subject on which much could be written, but upon which little ought to be written without deep and attentive study. It is easier to tear down than to build up; and whatever changes are introduced in the jury system should be gradually introduced and carefully guarded, so as while relieving the system as far as practicable of its present imperfections, not to destroy the main features of the system itself—the representation of the people at large in the administration of justice. Rightly or wrongly, there always has been and always will be a certain amount of prejudice against lawyers; and the repose of society seems to require that the administration of justice should not be committed exclusively to them.

Removal of Causes—Right of State Court to Act on the Petition — Copyright in Foreign Dramatic Compositions.

The question as to the right of a state court to determine the sufficiency of a petition and bond for removal of a cause to the federal court, under the act of Congress of March 3, 1875 (2 CENT. L. J. 209), was passed upon last week by Lindley, J., of the Circuit Court of Saint Louis county, Missouri, in the case of Shook and Palmer v. Rankin *et al.* The plaintiffs claimed the exclusive right to represent, in the United States, a dramatic play known as "The two Orphans," and sought to enjoin the defendants from representing it in Saint Louis. After the petition for an injunction had been filed, together with an answer and replication, the defendants presented a petition for the removal of the controversy to the United States court. It should be observed that the preliminary movements in the case had been so rapid that counsel had not had time to collect the decisions expounding the recent act, which are only to be found in the law journals. The court, therefore, not being advised as to the drift of judicial sentiment with regard to the meaning of the statute, and the matter being one of first impression, overruled the application and awarded a provisional injunction, forbidding a representation of the play by the defendants. An examination of the recent decisions expounding the act of 1875, convinced the defendants' counsel, Messrs. Hill and Russell, that that the filing of the application and bond for removal *ipso facto* suspended the jurisdiction of the state court, and that the injunction, which had been awarded *after* the tender of their application and bond had been made, was therefore void. They therefore advised their clients to

disregard the injunction and to continue to represent the piece. They in the meantime lodged a copy of the record in the office of the clerk of the United States Circuit Court, and procured from the clerk a certificate of that fact. The play was performed in disregard of the injunction (and, we may add, to an immense audience, attracted chiefly, no doubt, by the excellence of the performance itself, but in part by the interest in it which this litigation had excited); and an order was thereafter issued that the defendants show cause why they should not be punished for contempt. They appeared by their counsel and for cause showed that the cause *had been* removed to the Circuit Court of the United States before the injunction was issued, and that the injunction was therefore a nullity. In support of this position they cited Osgood v. The Chicago & Vincennes R. R. Co., 2 CENT. L. J. 283; First National Bank of Manhattan v. King Wrought Iron Bridge Co., decision by Mr. Justice Miller, reported in brief in 2 CENT. L. J. 616; and a decision of Mr. Circuit Judge McKennan, determined in the United States Circuit Court for the Eastern District of Pennsylvania, and reported in a late number of the Weekly Notes of Cases. The purport of these cases is that the mere filing of the petition and bond *ipso facto* removes the cause, and that it is not necessary for the state court to act upon the application. They also called the attention of the court to the strong language employed by the Supreme Court of Missouri in the case of Herryford v. The Ætna Insurance Co., 42 Mo. 151, 153, that "when a party makes an application for a removal of the cause, in the manner required by the act of Congress, it is error in the state court to proceed further in the matter, and every subsequent step is *coram non judice*;" and "that there can be no waiver of proceedings which are entirely erroneous and void for want of jurisdiction." On the other hand it was urged by Messrs. Krum and Madill, of counsel for the complainants, that the petition for removal was insufficient, in that it did not show that *all* the parties were residents of different states; and because the petition for the injunction did not lay any amount of damages, and because the question whether the amount in controversy exceeded the amount of five hundred dollars must be determined by the plaintiffs' petition, and not by the defendants' petition for removal. The learned judge, however, upon examination of the authorities submitted by the plaintiffs' counsel, decided that the filing of the petition, affidavit and bond for removal, and the lodging of a transcript of the record in the office of the clerk of the federal court, *ipso facto* removed the cause; that it was for the federal court, and not for him, to determine whether the cause had been rightfully removed; that as the act of removal had taken place before the injunction had been awarded, the injunction was issued without jurisdiction; or, at least, if the injunction was valid, any violation of it was a contempt of the federal court, and not of his court; and that the order to show cause should therefore be discharged.

It will be seen that in these proceedings the real merits of the controversy were not touched. The question whether the assignee of a dramatic play written by a foreigner can acquire an exclusive right to its representation on the stage in the United States is, in view of the fact that no inter-national copyright exists protecting the works of foreign authors in this country, an interesting one; since whatever right the assignee of such composition may have, can exist only on the theory that there has been no publication, and that it is hence private property. We purpose examining the decisions, and saying something on the question hereafter.

Telegraphs and the Liability of Telegraph Companies.*

§ 1. *Importance of the Subject.*—The science of telegraphy has become so related to our various commercial pursuits, and social and scientific interests, as frequently to require the application of legal principles to the adjustment of controversies relating thereto. The number and extent of telegraph lines in this country, covering like a spider's web the whole land, and closely uniting us with all parts of the Old World, and the vast amount of important business transacted through this means, render the interest only second in importance to our vast railroad system.

§ 2. *Are they Common Carriers?—Controversy.*—Some controversy has existed in reference to the question, whether telegraph companies are common carriers or whether their liability is the same as common carriers of merchandise. On general principles it may be said that their duty and liability are closely allied to that of common carriers, but that they are not strictly common carriers, nor subject to the same strict responsibility. The authorities are somewhat conflicting in reference to the extent and character of this liability. On one side it is held that they are amenable substantially to the same liability.† And on the other hand a more limited liability, if not maintained by a preponderance of authority, is at least by many very respectable ones.‡ In the case of Bruce & Munford v. U. S. Telegraph Company, the court (Johnson, J.) say, that the business of telegraphing, is "radically and essentially different, not only in

* From advance sheets of a Treatise on the Law of Damages, by G. W. Field, of the Iowa Bar.

† Baldwin v. U. S. Tel. Co., 1 Lans. (N. Y.) 125; s. c. 45 N. Y. 744; McAndrew v. The Electric Tel. Co., 33 Eng. Law & Eq. 180; Bowen v. The Lake Erie Tel. Co. (C. P.), Ohio (N. P.), 1 Am. L. Reg. 685 (1858); Parks v. Alta. Tel. Co., 13 Cal. 422; Bryant v. The Am. Tel. Co., 1 Daly 575 (1865); Washington & N. O. Tel. Co. v. Hobson, 15 Gratt. (Va.) 122 (1860).

‡ Leonard v. New York, etc., Tel. Co., 41 N. Y. 544; Per Hunt, J., in New York & Wash. Print. Tel. Co. v. Dryburgh, 35 Penn. 298 (1869); De Rutte v. N. Y., & Alb. Buff., Tel. Co., 1 Daly (N. Y. C. P.) 547; s. c. 30 How. Pr. 403 (1866); Smithson v. U. S. Tel. Co., 29 Md. 162 (1868); Ellis v. American Telegraph Co., 13 Allen 226; Breese & Munford v. U. S. Tel. Co, Allen Tel. Cases, 663 (s. c. 45 Barb. 274).

its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by a common carrier."‡ While in a former case, Daly, J., held, that as the business of these companies "is one which leads to their being intrusted with confidential and valuable information; especially in commercial matters, there are opportunities for fraud and abuses, which, in view of the relation which they occupy to the public, make it necessary upon grounds of public policy, that they should be held to a more strict accountability than ordinary bailees."§ The liability of telegaraph companies would appear, from the preponderance of authorities, more nearly to resemble the liability of the common carrier of passengers.¶

§ 3. *At Least Ordinary Care required.*—The weight of authority would authorize parties to stipulate in reference to damages on a breach of a contract to use extraordinary care and diligence on the part of a company, or for a breach of a contract insuring the prompt and correct transmission of the message; but it is still questionable, if they can so contract as to relieve themselves from all care, or from ordinary care. For although the "liberty to contract" is said to be "the highest policy," it is well settled, that a contract to relieve the common carrier from all liability for loss or injury, to the merchandise he undertakes to carry, is against public policy, and therefore void. And the reason for the distinction between common carriers and telegraph companies in this respect is not entirely clear.

§ 4. *Measure of Damages—Order for Salt.*—In relation to the measure of damages, on general principles the company should be liable for such damages as directly and naturally result from the breach of the contract to transmit, and by which it undertakes at least to use that diligence and care which the delicate and important character of the business requires, and which its patrons may reasonably expect; and also to all such damages as the parties contemplated, or had reason to contemplate, at the time of the contract, as the result of a breach. Thus, where the message was, "send 5000 *sacks* of salt immediately," and the message, through the negligence of the defendant, a telegraph company, was changed so as to read, "send 5000 *casks* of salt immediately;" and in compliance with the order thus received, the plaintiff sent the salt from Oswego to Chicago, to the plaintiff's agent who sent the message; and it appeared that the term "sack" designated a package of fine salt of about fourteen pounds weight, and the term "cask," a package of coarse salt of about 320 pounds weight, and that the salt sent under such erroneous order was more valuable in Oswego than in Chicago at the time it was sent, and that the plaintiff's agent, after receiving the same at Chicago, sold it for the highest price which could be obtained; it was held, that the measure of damages adopted in the court below, namely, the difference between the value of the salt at Oswego and at Chicago, and the cost of transportation from the former place to the latter, was sufficiently favorable to the defendant.*

§ 5. *The Doctrine of Hadley v. Baxendale, explained and applied.*—In considering the applicability of the doctrine of Hadley v. Baxendale,† to the breach of contracts on the part of telegraph companies, and particularly to the case under consideration, Earle, Ch. J., in delivering the opinion of the court in the above case, remarks: "It is not required that the parties must have contemplated the actual damages which are to be allowed; but the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts, usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of the rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if at the time they entered into it they had bestowed proper attention upon the subject, and had been fully informed of the facts. In this case then, in what may properly be called a fiction of the law, the defendant must be presumed to have known that this dispatch was an order for salt, as an article of merchandise, and that the plaintiff would fill the order as delivered; and that if the salt was shipped to Chicago it would be shipped there as an article of merchandise to be sold in the open market. And the market price in Chicago being less than the market price at Oswego, that they would lose the cost of transportation and the difference between the market price at Chicago and the market price at Oswego. I think, therefore, that the rule of damages adopted by the referee was sufficiently favorable to the defendant. The damages allowed were certain, and they were the proximate, direct result of the breach."

§ 6. *Mistake in a Message ordering Bouquets—Damages.*—So, where a telegraph company received a message ordering "two hand bouquets," and the agent of the company erroneously supposing the word "hand" to be "hund." and to stand for "hundred," delivered it thus altered, and the two

‡ 45 Barb. 274; s. c. 48 N. Y. 132.

§ De Rutte v. The N.Y., Alb. & Buff. Tel. Co., 1 Daly (N.Y. C. P.) 547 (1866.) There is perhaps a third class of cases where the doctrine of a bailee's liability is ignored, and they are placed upon the same ground in their dealings with parties as ordinary persons, and bound to the public in no other way than an individual. According to this view they are private corporations, and, like private persons, capable of contracting in reference to the business in which they are engaged, and which they undertake to perform, and of limiting their liability in the same way. Leonard v. N. Y. Tel. Co., 41 N. Y. 544, recently approved and followed by Appleton, J., in True v. International Tel. Co., 5 Chic. Leg. News, 170; s. c. 60 Me. In this case the plaintiff had employed the telegraph company to send a dispatch. The blank on which it was written bore on its margin a notice stating that the amount of damages to be recovered in case the message was not properly sent should be the price paid for transmitting the message, which was forty-eight cents. The learned judge in his opinion remarks: "Here is a contract. The consideration is sufficient. It is entered into by parties competent to contract. There is no statute prohibiting. It is a contract for the liquidation of damages to be paid in case of a violated contract. Whether the damages agreed upon be large or small, it is a matter for the contracting parties, and for them alone. If they are satisfied with large or small damages, it matters not to any one else." See also in relation to the measure of damages, Stevenson v. Mag. Tel. Co., 16 Upper Canada Rep. 530; Landsberger v. Mag. Tel. Co., 32 Barb. 530.

¶ For a discussion of this subject, see an article in 2 CENT. L. J. 198.

* Leonard v. New York, etc., Tel. Co., 41 N. Y. 544 (1870). See also, Rettenhouse v. The Ind., etc., Tel. Co., 1 Daly, 475; Bryant v. The Am. Tel. Co., 1 Daly, 576; New York and Washington Print. Tel. Co. v. Drysburg, 35 Penn. St. 298.

† 9 Exch. 341.

hundred bonquets were furnished accordingly. On an action brought by the receiver of the message against the company for damages in consequence of the mistake, it was held, that, "though telegraph companies are not, like carriers, insurers for the safe delivery of what may be entrusted to them, their obligations, so far as they reach, spring from the same source, namely, the public nature of their employment, and the contract under which the particular duty is assumed," and that it is one of the plainest of their obligations to transmit the very message prescribed. The plaintiff, who was a florist, was held entitled to recover the loss sustained, and the expenses incurred in cutting and procuring the large number of flowers required for the bouquets.*

§ 7. *Mistake in a Message ordering a Shawl—Damages.*—So, where a dispatch was delivered to a telegraph company in Michigan, ordering "one shawl," and by a mistake of the company the dispatch delivered in New York, was for "one hundred shawls," and in compliance with the order received, the plaintiff to whom it was addressed, sent from New York one hundred shawls to the sender of the dispatch in Michigan, where they arrived, but were re-shipped to the consignor at New York; it was held, in an action against the company, by the party to whom the erroneous order was delivered, that the measure of damages was the freight from New York to Michigan and back to New York, and the depreciation in the value of the shawls, they having arrived in New York after the shawl season was over.†

§ 8. *Delay in sending a Message ordering Property attached —Damages.*—In another case the message delivered to the telegraph company was: "Due $1800. Attach if you can find property—will send note by to-morrow's stage;" and, owing to a delay of the company in sending the dispatch until the day following the delivery, the debtor's property directed to be attached by the message was all siezed by other creditors, and the plaintiff could attach nothing; the court held the company liable for the whole debt that was by their negligence lost, as the direct and proximate damage resulting from the breach of the contract to transmit the message without unreasonable delay.¶

§ 9. *Mistake in a Message ordering Stock sold and other Stock purchased.*—In another case the plaintiff in Washington by a message directed his brokers in New York to sell five hundred shares of Michigan Southern Railroad stock, and purchase five hundred shares of Hudson River Railroad stock; but owing to a mistake of the telegraph company to which the message was delivered, the message delivered to the brokers directed them to buy five hundred shares of Michigan Southern Railroad stock. The brokers purchased the five hundred shares of Michigan Southern as directed by the erroneous message, at the morning board of that city. The plaintiff, on discovering the mistake, corrected it by repeating the dispatch, which, in its correct form, was not received by his brokers till after the morning board had adjourned. On receiving the telegram thus corrected, the brokers sold five hundred shares of Southern Michigan on the street. It was sold at the highest price then attainable, and the Hudson River stock purchased at the best terms that could be obtained; but the sale thus made of Michigan Southern stock, was less by $1750 than the highest price at which it could have been sold, had the message been correctly received and in due time, and was less by $1375 than the average price of the stock at the morning board. Judgment was rendered for the latter sum, and on appeal sustained by the court.‖

§ 10. *Mistake in a Message ordering Wheat purchased, etc. —Damages.*—And, where it appeared that a dispatch was delivered by the plaintiff to the defendant to be transmitted, directing the purchase of wheat at the limit of 22 francs the hectolitre, but through the defendant's mistake, the number "22," was changed to "25," in consequence of which, wheat was purchased at a price that proved a loss of more than $2000, the court held this loss to be the direct and immediate consequence of the defendant's mistake and negligence, and that it furnished the measure of the plaintiff's damages. The court further held that, although the defendant was not, like a common carrier, an insurer of the correct transmission of messages delivered to it, yet public policy required that it should be held to a stricter accountability than ordinary bailees, and that, as the value of its services consisted in the correctness and diligence with which it transmitted messages, any error in the message, or unreasonable delay in its delivery should be presumed to have arisen from its negligence.††

§11. *Delay in a Message ordering "Lepines" sold—Damages.*—In another case a message delivered to a telegraph company at New York, directed a party at St. Louis to "sell silver lepines for $10—also others for less;" but the dispatch was not sent by the company, and owing to the fluctuations in gold, which was at a premium, there was a considerable decline in the market before the arrival of a letter from the plaintiff at New York, to the party to whom the dispatch was addressed at St. Louis, containing the same instructions. In a suit for damages against the company, caused by not sending the message, it was held, that the defendant was liable for the want of due diligence and care in not sending the message, and that without being notified of the specific pecuniary value of the dispatch, and that it was its duty to infer that the dispatch was of importance and of pecuniary value to the sender (the plaintiff); and that the damages should be measured by the decline in gold which caused the difference in the market value of lepines.**

§ 12. *Where by mistake a Message is wrongly directed and delayed.*—But where a message was delivered to the operator at O., by the plaintiff, to be sent to his agent at R., requesting him to telegraph back to the plaintiff the condition of a certain petroleum oil well at R., belonging to the plaintiff, and the operator was informed by the plaintiff that unless an answer was promptly received, he should sell the well at a certain sum, which had, to the knowledge of the operator, been offered him; and the ordinary charge for transmitting the message the whole distance and over the lines of two com-

*The N. Y. & Washington Print. Tel. Co. v. Drysburg, 35 Penn. St. 298.

†Bowen v. The Lake Erie Tel. Co., 1 Am. Law Reg. (N. S.) 685.

¶ Parks v. the Cal. Tel. Co., 13 Cal. 422 (1859). See also the same doctrine in Bryant v. The American Tel. Co., 1 Daly, (N. Y.) 575 (1865); and The Wash. & N. O. Tel. Co., v. Hobs on, 15 Gratt. (Va.), 122.

‖ Rittenhouse v. The Ind. Line Tel., etc., 1 Daly (N. Y.) 474; s. c. 44 N. Y. 263.

†† De Rutte v. The New York & C. Tel. Co., 1 Daly 547. See also, Smithson v. U. S. Tel. Co., 29 Md. 162 (1868); where the same doctrine is held.

**Strasburgh v. The West.Un. Tel. Co., N. Y. Sup. Ct. R. (1867). See Allen Tel. Cas. 661. See also The U. S. Tel. Co. v. Wenger, 55 Pa. St. 262. (1867).

panies having been paid, it was transmitted to S., and then received by the defendant, and transmitted to R.; but through the negligence of the defendant, it was wrongly directed, and did not reach the plaintiff's agent for several days afterwards, but the defendant had no knowledge of the special purpose of the message; and it appeared that the plaintiff, receiving no reply, sold the well at the offer, but it also appeared that it was worth more, and might have been sold for more, if the message had been duly received; it was held, that the defendant was not liable for the difference between the price for which it might have been sold, and for which it was in fact sold, as the agent receiving the message was not the defendant's agent, and the message contained no information from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it.*

*Baldwin v. U. S. Tel. Co., 45 N. Y. 744. See also Bryant v. Am. Tel. Co., 1 Daly, N. Y. 575; West. U. Tel. Co. v. Graham, 1 Colorado 230.

Escrow—Impeachment of Commercial Paper Executed but not Delivered.

ROBERTS v. McGRATH.*

Supreme Court of Wisconsin, June Term, 1875.

Hon. E. G. RYAN, Chief Justice.
" ORASMUS COLE, } Associate Justices.
" WILLIAM P. LYON, }

Note and Mortgage Delivered as an Escrow—Procured by Fraud and negotiated to Innocent Purchaser.—The defendant wrote his negotiable promissory note and executed his mortgage securing the same, and deposited them in the safe of a third person, subject to his (the defendant's) orders. They were procured from the custodian by the payee through fraud, and were by the payee negotiated to an innocent purchaser. *Held*, that such purchaser could not recover if the note and mortgage got into circulation without the maker's negligence; that the protection which the law merchant extends to the *bona fide* holder of negotiable paper, who acquires it for value before maturity, does not extend to a case where the instrument never had an inception or lawful existence as such, and where the party sought to be charged is free from negligence.

The action is on an instrument purporting to be a promissory note made by the defendant, payable to the Milwaukee and Horicon Railroad Company, or order, and (as it seems to be conceded, although the record fails fully to show the fact), endorsed to the plaintiff by the payee. The plaintiff received the note in due course of business, before due, for value, and without notice of any defence thereto. The answer of the defendant alleges that the note was never delivered to the payee, but was clandestinely and fraudulently obtained by it, without the knowledge or consent of the defendant, from a person with whom the defendant had deposited it to hold the same subject to his order.

It appears from the evidence, and is not disputed, that in the year 1856, the payee, the Milwaukee and Horicon Railroad Company, contemplated the procuring of authority from the legislature to extend its railroad to Grand Rapids (which it was not then authorized to do), and proposed to the citizens of that place, and of Centralia, that they take $75,000 of the stock of the company to aid in such extension. For the purpose of ascertaining approximately how much stock would be thus taken, many citizens of Grand Rapids made and executed their several notes and mortgages for different sums (but did not deliver the same) with the understanding and agreement between them and the railroad company, that the securities should be deposited in the safe of one Scott, but to remain entirely under the control and subject to the orders of the makers and mortgagors respectively. In case the latter should elect to deliver the same to the railroad company, the securities were to be received by it in payment for stock. Among the papers so deposited was the note in suit and a mortgage to secure the same executed by the defendant and his wife. The defendant sent the note and mortgage by Mr. Powers to be deposited in the safe of Scott, and Powers placed them there.

A short time after (the precise time does not appear), the agent of the railroad company who was instrumental in procuring the notes and mortgages to be executed, went to the store of Scott in his absence, and obtained possession of the same by pledging his honor to the clerk of Scott that he only desired them to make an abstract or schedule of names, descriptions and amounts, and would return them to the safe as soon as that should be done. Mr. Powers was present on that occasion and said to the clerk that he thought it a courtesy due to a gentleman who had given his word of honor to return the papers, to allow him to take them long enough to look them over, but at the same time Mr. Powers stated that he had no authority over them. The agent did not return the securities to the safe but delivered them to the payee, the railroad company, which negotiated them after having the mortgages registered in the office of the register of deeds. Among the secureties thus taken from the safe, delivered and negotiated, was the note in suit.

When the defendant learned that his note and mortgage had thus passed into the hands of the payee, he made diligent efforts to regain possession thereof, but without success.

Under the instructions of the court (which are sufficiently stated in the opinion), the jury returned a verdict for the plaintiff for the amount of the note, principal and interest; a motion for a new trial was denied and judgment entered pursuant to the verdict.

The defendant has appealed.

LYON, J.—That a *bona fide* holder for value of a negotiable promissory note before maturity, takes the same fee from equities between the original parties thereto, is a general elementary rule of the law merchant, none will deny. But to bring an instrument within this rule it must be the negotiable paper of the party by whom it purports to have been made. It is not sufficient that it has the form, that it is in the similitude of such paper, it must be such in fact. If it never had an inception or legal existence, the party sought to be charged upon it may always, unless estopped by his own negligence, defend successfully against it without regard to the time when, or the circumstances under which the holder acquired it. This court so held in Walker v. Ebert, 29 Wis. 194; in Kellogg v. Steiner, Id. 626, and in the case of Chipman v. Tucker, and Roberts v. Wood, decided herewith.

That an instrument in the form of a negotiable promissory note which has not been delivered by the alleged maker thereof, never had an inception, and has no legal existence as such, can not be doubted. Thomas v. Watkins, 16 Id. 549.

In Walker v. Ebert, will be found an able discussion of this whole subject by Dixon, C. J., in which he cites and comments upon many of the cases bearing upon it, and it is not deemed necessary to go over the ground again. The cases just cited must be regarded as settling the law in this state on the subject under consideration. Neither is it necessary to refer at length to the numerous cases in other states cited by the learned counsel for the plaintiff in support of the opposite doctrine.

These may be dismissed with the single remark that we believe it will be found on examination that in a very large majority of them, the instruments in question were delivered but were attacked for fraud, failure of consideration and the like, or that the alleged makers were fairly chargeable with negligence in allowing the same to get into circulation, and were estopped thereby to deny the inception and existence thereof.

We do not forget the claim and the argument founded upon it, that Walker v. Ebert is unlike the present case in its facts. It is undoubtedly true that the facts of the two cases are different. But the principle upon which the former case was decided is directly applicable here. The principle is that the protection which the law merchant extends to the *bona fide* holder of negotiable paper,

*Reported for this journal by J. G. Flanders, Esq., of Milwaukee, of counsel for the defendant.

who acquired it for value before maturity, does not extend to a case where the instrument never had an inception or lawful existence as such, and where the party sought to be charged is free from negligence.

The record in this case contains abundant evidence that the instrument in suit was never delivered by the defendant to the payee —the railroad company—or to any person for it. It was not even delivered or placed *in escrow*, but was lodged in the safe of Mr Scott, subject to the order and legal control of the defendant alone. Applying to the case the principes above stated, it must necessarily follow that the instrument is not the note of the defendant, and that he is not liable thereon to any person, not even to a *bona fide* holder who purchased the same for value before maturity, unless it got into circulation by means of his negligence.

The court refused to give the jury the following instruction prayed for on behalf of the defendant, and gave no instruction equivalent thereto: "To make the defendant liable on the note, it must have been intended to be put in circulation by delivery, or so put in circulation through some negligence or fault on his part, which contributed to, or did, put the same in circulation."

There was considerable controversy on the argument as to whether the certificate of the circuit judge thereto shows that the bill of exceptions contains all of the evidence introduced on the trial. Whether it does or not the record contains sufficient of the evidence to show that the proposed instruction was material and pertinent to the case. And it necessarily results, from the views above expressed, that the same should have been given.

The court instructed the jury as follows: "If Powers, after placing the same (the note) in the safe, although protesting that he had no authority to do so, directed the person in charge of the safe to deliver the note to the agent of the payee, the plaintiff, if an innocent holder for value before maturity, is entitled to recover."

We find no evidence in the record that Mr. Powers had any authority whatever to direct a delivery of the securities, or that he gave any directions to deliver the same. If all the evidence is before us, this instruction (which was duly excepted to), was clearly erroneous, there being no testimony to support it.

It would be improper to indicate here any opinion on the question of the alleged negligence of the defendant. That will be for the jury to determine when the cause shall be again tried.

The judgment must be reversed and the cause will be remanded for another trial. JUDGMENT REVERSED.

The Passage of Laws.

PETER LAIESON *ET AL.* v. THE PEORIA, ATLANTA AND DECATUR RAILROAD COMPANY *ET AL.**

Supreme Court of Illinois, Oct. 13, 1875.

Hon. PINCKNEY H. WALKER, Chief Justice.
" SIDNEY BREESE,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" BENJAMIN R. SHELDON,
" WILLIAM K. MCALLISTER. } Associate Justices.

1. **Pleading—Answer of Corporation—Seal.**—The answer of a corporation to a bill in chancery, where answer under oath is waived, is mere pleading, and although it is more regular to require the corporation to answer under seal, it is not essential, nor cause for reversal, if the seal is not attached.

2. ——. **Answer of Municipal Corporation—Signature of Officer.**—The answer of a municipal corporation may be signed in the name of the corporation, and does not require the signature of an officer in addition.

3. **Legislative Bills—Object of Numbering them.**—The object of numbering bills introduced in the legislature, is to preserve their identity and aid in the dispatch of business; and to show that the bill was read the requisite number of times in each house, and was passed by the constitutional vote.

4. ——. **Title of Bill.**—The title of a bill is one means of identification, but is not an essential part of a bill, and is usually adopted after the bill has passed. The title of a law is an essential part of the law.

*Reported for this Journal by Messrs. Ingersoll & Puterbaugh of Peoria, Illinois.

5. ——. **Law Signed by Speakers presumed Valid—Presumption may be Rebutted.**—A law signed by the speakers of the two houses, and approved by the governor, is presumed to have been constitutionally passed and valid until that presumption is overcome by legitimate and clear and convincing proof that it did not pass regularly.

John M. Palmer & J. Mayo Palmer, counsel for appellant; *Ingersoll & Puterbaugh, and W. S. Bush*, counsel for appellee.

WALKER, Ch. J., delivered the opinion of the court.

This was a bill in chancery filed by appellants in the Logan Circuit Court in behalf of themselves and other tax-payers against the railroad company, town collectors and others, to restrain the collection of a tax.

The bill alleges that the town auditors, in the towns of Atlanta and Oran, on the 12th day of August, 1873, made a certificate that there was due certain sums of money to be paid for interest on bonds, issued to aid in the construction of the railroad. The bill charges that there was issued by the authorities $37,000 of bonds, and that the town authorities had delivered a portion, and that the president of the railroad company had possessed himself of another portion, without the consent of the supervisor or town clerk. That the town authorities had certified that the interest on the bonds was a town charge, and delivered the same to the county clerk to be extended as a tax on the real and personal property in the town, and that the county clerk claims that he, in the discharge of his duty, is compelled to extend the same on the taxable property in the towns.

This bill charges that the railroad company claims to be organized under a special law of the general assembly, under which its officers acted in laying out the road, but complainants deny that it was ever constitutionally adopted by the general assembly, and claim that all acts performed in the levy of this tax are therefore void. That the road is not completed, and the officers of the company represented that it would proceed promptly to construct the railroad from Peoria by way of Atlanta to Decatur, and that any bonds that should be voted therefor should be faithfully devoted to the construction of the road, and the company had, or soon would have, sufficient funds for that purpose; that all of these representations were false, and were made knowing them to be false, and with intent to cheat and defraud the town and the tax-payers, and to obtain the bonds without a valuable consideration therefor.

It is charged that it never was intended in good faith to complete the road; that it is not completed; that the road has not been prosecuted promply and in good faith; that the officers of the company still hold the bonds, or have converted them to their own use, and that they have sold the franchises, and abandoned the construction of the road. On filing the bill, a temporary injunction was issued staying the collection of the tax.

The Railroad Company, Dunham, Dills, Lambert, and the town of Atlanta answered the bill, which was verified by the affidavit of Dills and Dunham, to be used on a motion to dissolve the injunction. Prior to the hearing of that motion, complainants moved to suppress the answer, because, so far as it related to the railroad company, it was not under the seal of the company, and was not signed by one of its officers, and as to the town of Atlanta, because it was not signed by an officer of the town. This motion was overruled. The answer denies all the material allegations of the bill.

Subsequently, a motion to dissolve the injunction came on to be heard on bill, answer and affidavits filed. The court dissolved the injunction and the bill was dismissed, and complainants bring the case to this court by appeal.

The answer, amongst other things, stated that the bonds were not in the hands of the company, but had been sold and delivered to innocent purchasers; and this and other allegations in the bill were fully sustained by the proof; and appellants make no point on that question in their argument, but insist that the court erred in refusing to strike the answer from the files, and in assessing damages for the wrongful suing out of the injunction.

The answer was called for without oath, and was only sworn to for the purpose of being used as an affidavit on the motion to dissolve. Such an answer has always been held to be a mere pleading, only denying the allegations of the bill and putting complainants to their proof, and to disclose any special defence he may rely upon; and although it is more regular to require a corporation to answer under seal, we feel no inclination to reverse a case on that ground alone. When the evidence sufficiently sustains a full answer to which there is no objection, we would not be warranted in reversing, because one of the defendants had failed to attach its seal. There is no suggestion that this answer is not sufficient as to Dunham, Dills and Lambert; it sets up the entire defence, which applies as well to the railroad company and to the town of Atlanta as it does to them; and the same is true as to the officers having charge of the collection of the taxes.

Had the railroad company set up a defence peculiar to themselves, then it would have been different. The proceeding was virtually against the bond-holders, and the railroad was but a nominal party; and had the railroad company made no answer, but had been defaulted, still the court would not have continued the injunction against the collection of the money to pay the interest to the bond holders, unless it had been apparent from the evidence that the bonds were void, or some equitable grounds were shown against the bond-holders. And as the evidence required the dissolution of the injunction, even if the railroad company had been defaulted, we must decline to reverse, on the ground that the answer of that company was not under seal. It might be treated as a nullity and as not being on file, and still the dissolution would be correct.

The objection taken to the town of Atlanta is that it was not signed by an officer of the town. This is answered by the case of Fulton County v. Miss. & Wabash R. R. Co, 21 Ill. 338, where it is held that a defendant need not write his own name to his answer. Here the name of the corporation was written, and there is nothing to show that it was unauthorized. Nor are we aware of any rule of practice that requires the president or any officer to sign his name, in addition to that of a municipal corporation, to an answer to a bill or other instrument. That is done, as their charter authorizes, in the name of the corporation.

On examining the evidence, we find that it sustains the finding of the damages decreed by the court on dissolving the injunction. The sum allowed was reasonable, and was shown to be so by the evidence. The statute authorized it, and the court was required on the evidence to allow the damages and render a decree therefor.

We now come to the consideration of the question of whether the charter of the railroad company, under which this subscription was made and the bonds issued and the taxes levied, was constitutionally adopted. It appears from a certified copy of the journals of the senate, that on the 28th of January, 1869, Mr. Nicholson introduced Senate Bill No. 453, for an act to incorporate the Peoria, Atlanta and Danville Railroad Company, which was read a first time, and on his motion the rule was unanimously dispensed with, the bill read a second time, and referred to the committee on railroads. It also appears that Mr. McManus, from the committee on railroads, to which was referred Senate Bill No. 453, for an act to incorporate the Peoria, Atlanta and Decatur Railroad Company, reported the same back and recommended its passage as amended. The report of the committee was concurred in and the bill ordered to be engrossed for a third reading. The journals show that this bill, No. 453, was regularly passed on the call of "ayes" and "nays."

The objection taken is that there were two bills of the same number, but of different titles—that one was regularly introduced, read twice and referred to the appropriate committee, and that a member of the same committee reported back another bill of the same number; that the act under which the company claims was but once read before its passage. If this position is true, the bill failed for want of compliance with constitutional requirements to become a law.

But is the position well-taken? The constitution requires every bill to be read on three several days in each house, unless in case of urgency three-fourths of the house, when such bill was pending, should deem it expedient to dispense with the rule; and the question is, was the bill for this act ever read three times in the senate before its passage by that body? If the entry on the journal refers to the same bill, then the requirements of the organic law are satisfied. If not, then the act is void. The question, then, is one of identity. Do these entries show there was one or two bills acted upon by the senate? The number is the same throughout—about that there is not the pretense of the slightest doubt.

And it is manifest that to have more than one bill pending at the same time, with the same number, would lead to confusion. It would defeat the very object of numbering bills, which is to preserve their identity and prevent confusion. The placing a number on each bill by each house, is well calculated to aid in the despatch of business, in enabling members to vote intelligently, and the secretary to note the proceedings under each. It is adopted as a matter of convenience and as a means of always identifying a bill. It is true the fundamental law does not refer to the numbers of bills, but leaves each house the choice of means to identify their bills, so that the journals shall show that each was read the requisite number of times and was passed by the constitutional vote.

That there was but one bill, and that it was passed there seems not to be the slighest doubt. If the senate were in the habit of permitting their secretary to place the same number on several bills introduced in that body, then there might be a doubt created, but such is not the practice, and when we find a bill introduced and read a first and second time by one title, and referred to a committeee, and it is reported back with the same number, but a change is made in the title, and the report says the bill has been amended by the committee, is there the slighest reason to doubt that it is the same? The presumption would rather be, that the secretary had mistaken the title, and so entered it on his journal, or as the committee report, that they had amended the bill, that the change in title was one of the amendments they had made.

The constitution does not require bills to be entitled, but that is done as a means of identification. If a bill were introduced without a title, and regularly passed, and the title then adopted, we are unable to see that there would be any constitutional objection to such a law for that reason. The title to a bill is usually adopted after it has passed the house, and is not an essential part of a bill, although it is of a law.

If we find a law signed by the speakers of both houses, and approved by the governor, we must presume that it has passed in conformity with all the requirements of the constitution, and is valid, until the presumption is overcome by legitimate proof; and in such case the evidence must be clear and convincing. It is by no means sufficient to only create a doubt whether the requirements of the organic law have been observed, but it must be clearly proved.

In this case we do not think that the proof offered to impeach this law has produced that effect, but it has failed even to cast a doubt on the proceedings by which it was adopted.

A careful consideration of this entire record fails to disclose any error, for which the decree of the court below should be reversed, and it must be affirmed. DECREE AFFIRMED.

—THE Supreme Court of Indiana lately adopted the following rule, which is numbered 36: "When it shall be discovered, or when objection shall be made, after a cause has been submitted, that the transcript is not legally certified, or that the clerk has not affixed his seal thereto, the appeal will not be dismissed for such reason, unless the appellant shall fail to remedy the defect within such reasonable time as the court may fix, according to 2 G. & H. 278, section 581, of which time he shall have notice from the clerk of the court."

Warehouseman or Common Carrier—Final and Intermediate Consignees.

MICHIGAN CENTRAL RAILROAD COMPANY v. HENRY H. LANTZ AND GEORGE MACY.*

Supreme Court of Michigan, October 19, 1875.

Hon. BENJAMIN F. GRAVES, Chief Justice.
" ISAAC MARSTON, } Associate Justices.
" JAMES V. CAMPBELL, }
" THOMAS M. COOLEY, }

1. **Storage as Warehousemen for Intermediate Consignees.**—The charter provision permitting the Michigan Central Railroad Company to charge as warehousemen for the storage of goods left in its depots, beyond a certain length of time, applies not only to goods delivered by them, directly to the final consignee, but to goods transferred to another carrier, as intermediate consignee, for further transportation.

2. **Goods "Awaiting Delivery" to Another Carrier.**—The proviso in § 16 of the charter in the Michigan Central Railroad Company, that the company shall be responsible only as warehousemen, for goods on deposit in any of its depots "awaiting delivery," refers to goods that are awaiting delivery to another carrier, as well as to goods destined to some final consignee on the line of the road itself.

Opinion by MARSTON, J.

The only question of any importance in this case is: Whether the railroad company, under its charter, is responsible as common carrier or warehouseman for goods transported to Detroit, and there deposited in its warehouse awaiting delivery to an intermediate consignee, and afterwards destroyed by fire while so deposited.

Although it was held in Michigan Central Railroad Company v. Hale, 6 Mich. 243, that under such circumstances the company was responsible only as warehousemen, there now seems to be a misapprehension in the minds of some persons as to what was decided in that case, owing to recent decisions in New York, and the Supreme Court of the United States.

The decision in this case depends entirely upon the construction of §§ 11, 12, 15 and 16 of the company's charter. Section 11 authorizes the company "to charge for tolls and transportation such sums as shall be lawfully established by the by-laws of said company." And by sec. 12, "the said company shall have full power and authority to demand and recover and take the tolls or dues to and for their own proper use and benefit, on all goods, merchandise and passengers, using or occupying the said railroad or any other convenience, erection or improvement, built, occupied or owned by the said company to be used therewith, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, as well as the manner of collecting all tolls and dues on account of transportation, and carriage and storage, and shall have full power to erect and maintain such toll-houses and other buildings for the accommodation and proper transaction of their business, as to them may seem necessary." That portion of sec. 15 bearing upon this question reads as follows: "It shall and may be lawful for the said company, from time to time, to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad as aforesaid, * * and for storage of property remaining in the depots of said company, if not taken away as hereinafter provided." And the 16th section provides that "the said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained in any of their depots more than four days," except the Detroit depot, where storage may be charged after the expiration of twenty-four hours, upon goods not taken away. "*Provided*, that in all cases the said company shall be responsible for goods in deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers." Sess. Laws of 1846, pp 51–53.

*Reported for this journal by Henry A. Chaney, Esq., of Detroit.

Now, although it is this last proviso which exempts the company from liability as common carriers, yet, in order to ascertain the true intent and meaning of this particular provision, it becomes necessary to examine §§ 11, 12, 15 and 16 as above quoted. It is insisted that the whole of sec. 16 "clearly refers to cases where the goods have arrived at their final destination, and are awaiting delivery to the owner or consignee, and does not apply where such goods are awaiting transportation," by another carrier. Sections 11, 12 and 15 give the company authority to fix, regulate and receive tolls and charges for the transportation of property over its road. There is and can be no doubt but that the authority thus given includes the right to fix, regulate and receive tolls for transporting property, which, upon arrival at the end of the company's line of road, is to be delivered over to some other carrier for further transportation. If this is not the case, then the company is placed in the strange position of being compelled as a common carrier to transport property consigned to some person in another state or country, and deliver the same over to the next carrier without having any power whatever given it by its charter to fix or receive tolls, or charges for the transportation of such property, as the only authority given the company upon this subject is in the language quoted.

The legislature, also, in the same sections and in the same connection, gave the company full power and authority to demand, recover and take tolls or dues on all goods and merchandise using or occupying the said railroad or any other convenience, erection or improvement, built, occupied or owned by the company, and gave it power to regulate the time and manner of collecting all tolls and dues on account of transportation, carriage and storage, with full power to erect and maintain such toll-houses and other buildings for the accommodation and proper transaction of their business as to them might seem necessary, and with authority to fix, regulate and receive charges for storage of property remaining in their depots, if not taken away as therein provided. Secs. 12 and 15. And again, in sec. 16, the company is given power to charge and collect a reasonable sum for storage upon all property transported by them, upon delivery thereof at any of their depots, and which shall remain therein longer than the time specified.

These different provisions all have reference to the same subject-matter, and must therefore be considered and construed together. When so considered and examined, we fail to discover the slightest ground for saying that any distinction whatever was made, or intended by the legislature, between property, whether awaiting delivery to an intermediate or to a final consignee. The clear and evident intention was to authorize the company to fix and collect tolls and charges for the transportation and storage of both classes of property, and to place them in all respects upon the same footing.

Let us, however, pursue the enquiry still farther and see what the result of a different construction would be.

As a common carrier, it is the duty of the company to receive and carry all property offered it for transportation. It can not refuse to receive and carry property, simply because the same may be consigned to parties which would necessitate a delivery to another carrier, in order that the property might be taken to its final destination. The company having received and carried such property over its line, must take proper care of it until such time as the next carrier may be ready and willing to receive it. It is very evident that the company must, under such circumstances, very frequently have to store property so carried and awaiting delivery to the next carrier, the same as it does property awaiting delivery to the ultimate consignee. Is there any good reason, then, why the company should not be permitted to charge and collect storage on both classes? Is there any reason why the non-resident consignee should be exempt from a burden which, under circumstances in every respect similar, the resident consignee must pay? To store and take care of such property is equally beneficial to the non-resident as to the resident consignee,

—why, then should not each be subject to like charges? And why should the legislature discriminate between them? The result of the doctrine, now contended for by defendant in error, if carried out, would be manifestly so unjust to the citizens of our own state that we can not attribute to the legislature any such intention.

But the construction contended for would also create a distinction between consignees residing in this state. Goods shipped or consigned to a person residing upon the line of the company's railroad would be subject to charges for storage, if permitted to remain in the company's warehouse more than two days after their arrival, while goods consigned to a person not residing upon the line, and which would have to be transferred to some other carrier for delivery to the final consignee, would not be subject to any charge for storage, no matter how long they were permitted to remain in the company's warehouse. It is also a well-known fact that at the time of the granting of this charter by the legislature, there were no lines of railroad running east from Detroit. Goods carried over the line of the Michigan Central Railroad, consigned to Buffalo, and points east of Detroit, could only be shipped from thence by water. It very frequently happened that serious delays occurred in the shipment from Detroit on account of storms, and that about the time navigation would close each season, there would be goods awaiting shipment which would have to remain and be stored until the opening of the navigation the next season. All these facts were well known, and it can not be supposed that the legislature intended the railroad company should store and take care of the goods so awaiting delivery, under such circumstances, without any compensation therefor. The language should be clear and explicit to warrant us in coming to such a conclusion.

We now come to the proviso in the 16th section, under which it is insisted the company is responsible in this case. That proviso reads "that in all cases the said company shall be responsible for goods in deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers."

While, in examining this proviso, we must not extend it beyond its general scope and object, neither must we limit it, unless we are satisfied that such a limitation was intended. We must also examine it in the light of those provisions which preceded, and of which it forms a part. As was said in Michigan Central Railroad Company v. Hale, 6 Mich. 243, the legislature by this proviso "designed to adopt a certain and independent rule relative to the liability of this company, to avoid the uncertainties of the common law." What uncertainties were to be avoided? Suppose the railroad company carries goods over its line, consigned to Buffalo, and to be delivered in Detroit, to another carrier for transportation across Lake Erie, and that this latter carrier, on account of a storm, is unable to take the goods for a period of ten days after their arrival in Detroit. Is the railroad company, during all this period, to remain liable as common carrier for the safety of these goods? Or suppose the lake-carrier refuses to receive the goods,—how long shall the railroad company be required to store them? And shall it be liable as a common carrier or as a warehouseman for their safety? It may be said, however, that the company, by giving notice, and after the lapse of a reasonable time thereafter, could terminate its liability as a common carrier. But to whom shall this notice be given?—to the next carrier, or to the ultimate consignee? And what shall be considered a reasonable time after the service of such notice? It is apparent that there would be considerable uncertainty surrounding these and other questions likely to arise. The question as to what would or would not be a reasonable time is one that, from the very nature of things, must be always uncertain. Each case must and would depend upon its own peculiar circumstances. It is clear, therefore, that where goods are awaiting delivery, either to an intermediate or final consignee, it would, in many cases, if not always, be difficult to say just where the company's liability as a common carrier ceased, and its liability as warehouseman began. And this difficulty would be increased from the fact, that under the previous provisions of § 16, storage could not be collected until more than four days had elapsed after the delivery of the goods in their warehouse in Detroit, and at all other stations on their road until after two days. Under such a provision it would be insisted that the company could not hold the goods in any such case as warehousemen until the time had elapsed entitling them to charge and collect storage. It was therefore to avoid these uncertainties, and to prevent such a construction as last suggested, that this proviso was inserted, and it was intended to apply to all goods awaiting delivery, either to the intermediate or final consignee.

The reasons for applying it in the one case are equally applicable in the other. We have already said that the company could collect charges for the transportation of goods which were to be delivered to another carrier for farther transportation, and that it could also collect storage upon such goods while awaiting delivery the same as upon goods awaiting delivery to the final consignee. Such being the case, we fail to discover any good reason why the liability of the company should not be as clearly defined in the one case as in the other. No good or sufficient reason has been assigned why the legislature in the case of resident consignees. should exempt the company for its extraordinary liability as a common carrier for the loss of goods awaiting delivery, and in the case of non-resident consignees, under similar circumstances in all other respects, hold the company liable. Ordinarily it is not expected that legislation will be less favorable to our own citizens than to those of a sister state or foreign country.

It is, however, insisted that the words "awaiting delivery" exclude goods which are to be transported over some other line, as such goods are not awaiting delivery, but awaiting transportation; and counsel insists that such was the decision in Railroad Company v. Hale. The court there said, "Goods are on deposit in the depot of the company either awaiting transportation or awaiting delivery. This section has reference only to goods which have been transported and placed in the company's depot for delivery to consignee." This language of the court does not warrant the construction which counsel attempts to give it. The court clearly classifies all goods as either awaiting transportation, or awaiting delivery. The first includes all goods received and which are awaiting transportation by the company over its own line of road; the second, all goods which have been carried by the company and are awaiting delivery either to the intermediate or final consignee. Goods which have been transported by the company and placed in its depots for delivery are awaiting delivery to the consignee, even though they are to be taken by another carrier for transportation to some other place. In this case the person to whom the flour was shipped at Buffalo, was the final or ultimate consignee, while the transportation company whose duty it was to receive the flour at Detroit and carry it from thence to Buffalo, was the intermediate consignee. This intermediate consignee was entitled to possession of the flour at Detroit, and had the railroad company refused to deliver the same, could have maintained an action therefor. Such intermediate consignees have been long known and recognized in the law. See Abbott on Shipping, 421; Canfield v. Northern Railroad Company, 18 Barb., 588; Strong v. Grand Trunk Railroad Company, 15 Mich., 216. We are of opinion, therefore, that the flour, at the time it was destroyed, was in the railroad company's depot awaiting delivery, and that under § 16 of the charter, the company is responsible for the loss thereof as warehousemen and not as common carriers.

We were referred to Mills v. Michigan Central Railroad Company, 45 N. Y. 622, and Michigan Central Railroad Company v. Mineral Springs Manufacturing Company, 16 Wall., 318, as holding a contrary doctrine. We have examined these cases and are of opinion that the reasons therein stated are not sufficient to warrant us in coming to a conclusion in this case different from that

arrived at in Michigan Central Railroad Company v. Hale, 6 Mich. 243. We have always considered the question as settled by the decision in that case, and such has also been the understanding of the members of the bar throughout the state. The conclusion there arrived at has never been questioned before the commencement of the action in this case. Under this view the other questions discussed become unimportant.

The judgment must be reversed with costs, and a new trial ordered.

Railway Mortgages and Material-Men's Liens—Priorities.

NELSON v. IOWA EASTERN RAILWAY CO.*

Supreme Court of Iowa, October Term, 1875.

Hon. WILLIAM E. MILLER, Chief Justice.
" CHESTER C. COLE, } Associate Justices.
" JAMES G. DAY, }
" JAMES BECK, }

1. **Railway Mortgages—Mortgages of After-Acquired Property—Liens of Material-Men—Priorities—The Point in Judgment.**—A mortgage executed by a railway company to a trustee, embracing all the property then owned or thereafter to be acquired by the mortgagor, for the purpose of securing bonds agreed to be issued to a contractor in part payment for the building and equipping of the company's road, takes precedence, in Iowa, of the lien of a material-man for ties furnished and used in the building of such road, after the recordation of the mortgage, although such ties were furnished before the issuing of the bonds which the mortgage was intended to secure, but not until the contractor had expended a large sum of money in carrying out his contract.

Argument 1. Mortgage of After-Acquired Property—Case Distinguished.—Although a mortgage of property afterwards to be acquired may not take precedence of liens intervening between the recordation of such mortgage and the acquisition of the property embraced in it; yet it is not so in the case of a mortgage executed to secure a binding contract subsisting at the date of the execution of such mortgage. The case of Ladue v. Detroit and Milwaukee R. R. Co., 13 Mich. 396, distinguished.

Argument 2. Mortgage to Secure Future Advances—Tacking—Intermediate Liens.—When a mortgagee has bound himself to make advances or incur liabilities, such advances tack, and the mortgage, when recorded, is a valid lien for all the advances actually made, although they may have been made after notice of a subsequent mortgage or incumbrance of the property.

Argument 3. Rights of Purchasers of Mortgage Bonds.—Purchasers of railway bonds payable to bearer, and secured by a mortgage which purports be of even date with the bonds, are not bound to enquire whether the bonds were in fact executed contemporaneously with the mortgage, or whether, before the signing or negotiating of the bonds, the liens of material-men may not have attached.

Argument 4. An Illustration.—The material-man in such a case is affected with notice of the mortgage, by the fact of its being recorded, and stands in no better position than a second mortgagee, where the bonds secured by the first mortgage had not been negotiated until the second mortgage was executed. He should protect himself by refusing to sell his materials without payment or security.

Argument 5. Mortgage of After-acquired Property—Property Acquired affected with other Liens, but incorporated with Mortgaged Property.—The principle that a mortgage designed to cover after-acquired property attaches itself to such property only in the condition in which it comes into the mortagor's hands, and that whatever interest the mortgagee acquires in it is subject to the liens which encumber it, where it is so received by the mortgagor, does not apply to cases where the property encumbered by leins when it comes into the hands of the mortgagor, becomes so incorporated with the other mortgaged property (as in case of plaster or paint in a house, or ties in a railroad track), that it can not be removed without a destruction of the whole. Nor does § 1855 of the Iowa Code of 1860, giving a specific lien on the building or erection in preference to prior liens, apply to such a case.

2. **Nature of Material-man's Lien upon Railroad in Iowa.**—The court below established the lien of the material-men in this case simply against the Iowa Eastern Railroad (subject to the prior lien of the mortgagees), and refused to establish it against the iron, rails, ties, depots, rolling-stock and engine-house and turn-tables of the road. *Held*, no error; the statutes in force at the time gave a general lien upon the road, or a specifie one upon the ties furnished, if they were in a condition to be removed.

Appeal from Clayton District Court.

The plaintiffs claim of the Iowa Eastern Railway Company $2182.82 on account of ties furnished the company for construction of its road, and ask that their lien therefor may be established and declared prior to the lien of the other defendants, who are the holders of bonds of the road secured by the mortgage thereon. The intervenors allege that they are the holders of bonds secured by mortgage, and claim that they are entitled to priority over the lien of plaintiffs. The court rendered judgment against the railroad company for the amount claimed and interest, and established a lien therefor against the road, subject and inferior to the lien of the intervenors. Plaintiffs' appeal.

L. Bullis, for appellant; *L. O. Hatch* and *J. O. Crosby*, *Wm. B. Fairfield*, *S. Murdock* and *T. Updegraff*, for appellee.

DAY, J.—The Cassville, Milwaukee and Montana Railway Company was incorporated May 22nd, 1871. The several intervenors in this action subscribed to the road, and were to have its bonds for their subscriptions. The Iowa Eastern Railway Company was incorporated February 9th, 1872. On the 23rd of March, 1872, the Milwaukee, Cassville and Montana Railway Company was conveyed to the Iowa Eastern Railway Company, the latter company agreeing to pay the debts of the former, and to execute its bonds to the intervenors, in payment of their claims for subscriptions.

On the 16th day of February, 1872, the Iowa Eastern Railway Company entered into a contract with Frederick A. Lane, in which it was agreed that Lane should construct and equip the road on a guage of three feet, from McGregor, Iowa, to a point near Des Moines, Iowa, and deliver the same to said company; in consideration whereof the company agreed to deliver to Lane the first mortgage bonds of said railroad at $8,000 per mile, the second mortgage bonds at $5,000 per mile and capital stock fully paid at $21,000 per mile. On the same day the Iowa Eastern Railway Company, having sixteen miles of its road graded, executed a mortgage to the Farmer's Loan and Trust Company, making them trustees to sell and negotiate the bonds described in the mortgage. This mortgage contains the following recital: "That for the purpose of constructing, equipping and completing its said road, it has decided to negotiate and procure a loan to the amount of $8,000 per mile of constructed road of its line of road, upon terms and security mentioned in this mortgage, and that for that purpose it resolved to make, execute and deliver bonds payable to bearer, to be secured by a mortgage or deed of trust of the said railroad from McGregor to DesMoines, together with its appendages, franchises and right of way, as well as all the lands and real estate that said railway company does now, or may hereafter hold, or acquire, and also all the rolling stock and property used in operating said road, and including all hereafter to be acquired for its use, and to negotiate, sell and dispose of its bonds for said purposes, to-wit: 800 bonds of $1,000 each, numbered from 1 to 800, both inclusive, and 800 bonds of $500 each, to be numbered from 801 to 1600, both inclusive, and 2400 bonds of $100 each, to be numbered from 1601 to to 4000, both inclusive, and that each of said bonds to bear even date of said mortgage, and to provide for the payment of the principal at the office of the Farmer's Loan and Trust Company in the city of New York, on the 16th day of February, 1902, and for the payment of semi-annual interest at 8 per cent, at same place, on presentation of coupon, and all of said bonds to be deemed equally and ratably secured, without any preference for any cause one over another, and to be issued as required and executed under seal of said company and attested by its president and secretary, and that each of such bonds being so sealed and signed shall be delivered to said Farmer's Loan and Trust Company as trustee, and which bonds shall be countersigned by said trustee in its capacity of trustee, and that said countersigning shall be conclusive proof that the said bond is secured by this mortgage."

The mortgage then contains a conveyance to said trustee of all the aforesaid described property in trust, to secure the payment of said bonds, with power of sale, etc.

This mortgage was recorded March 6th, 1872.

In the month of March, 1872, Lane, the contractor, bought and paid for 700 tons of iron which is now in the track of the Iowa Eastern Railroad and cost $65,000. He also paid $800 for office furniture. In April, 1872, he bought and paid for 100 tons of iron.

*The full title of this case is Ole Nelson and W. A. Benton v. The Iowa Eastern Railway Company and others, defendants, and William Larrabee, Thomas Updegraff and others, intervenors.

He also bargained for spikes, fish-plates, bolts and lock-nuts, costing $10,500. He bought two engines costing $7,500 each, and made other expenditures on behalf of the road.

The printing of the bonds was ordered prior to the date of the mortgage, but it took over a month to print them, and as soon as they were ready to be signed, E. H. Williams, the president of the company, went to New York and signed the entire amount described in the mortgage, about the middle of April, 1872, and saw them delivered to the trustee, and ordered him to deliver them on the requisition of one Marvin. All of the bonds upon which the intervenors in this action claim priority, were delivered to Lane sometime in May, 1872, except one bond to Woodworth, and four of $1,000 each held by Larrabee, which were delivered in the spring of 1874. The bonds which Lane had were turned over to Williams, on sufficient consideration, the latter part of May, 1872, and were deposited with the First National Bank of McGregor, as collateral security for an indebtedness of the Iowa Eastern Railway. Afterwards Williams again obtained possession of these bonds and transferred them to their respective intervenors in this case in June, 1872. All the bonds which the intervenors held were delivered in discharge of claims held against the old Cassville, Milwaukee and Montana Company, which the Iowa Eastern assumed on the conveyance to it.

In April, 1872, the plaintiffs commenced furnishing railroad ties for the Iowa Eastern Railroad, and during that month and including the 1st day of May they furnished ties to the amount in value of $2,180.82. They filed a statement in the usual form for a mechanic's lien on the 20th day of July, 1872.

I. The most important question presented in this case is whether or not the plaintiff's lien for the material furnished is senior and superior to that of the intervenors.

The right to make the mortgage in question is conferred by sections 1339 and 1340 of the Revision. Upon this subject see also the following authorities: United States v. New Orleans R. R., 12 Wall. 362; Jessup *et al.*, Trustees, v. Bridge *et al.*, 11 Iowa, 573; Pierce v. Emery, 32 N. H. 484; Dunham v. the Cincinnati, Peru &c., Ry, Co., 1 Wall. 254.

The mortgage in question was recorded March 6, 1872, and the bonds secured by it were not signed and delivered to the trustee until the middle of April following. Plaintiffs commenced furnishing ties on the 15th of April. Plaintiffs claim that at that time, the mortgage, although recorded, created no lien, because no debt was in existence to which it was incident. We are cited to the case of Ladue v. the Detroit and Milwaukee Railroad Company, 13 Mich. 397, in which that court, by Christiancy, J., in an opinion of great research and cogency of reasoning, determined that a mortgage instrument, without any debt, liability or obligation secured by it, can have no present legal effect as a mortgage or an incumbrence upon land, and that the instrument can only take effect as a mortgage or incumbrance from the time when some debt or liability shall be created, or some binding contract made which is to be secured by it. In that case a mortgage was made to secure liabilities which it was optional for the mortgagee to incur in the future, and before any were incurred the mortgagor sold the land, and it was held that the vendee took it discharged of the mortgage. We are not disposed to controvert the correctness of this conclusion in a case to which it is applicable. But the facts of this case, we think, bring it under a different principle. Upon the day that this mortgage was executed, Lane entered into a valid contract with the company to construct and equip their road from McGregor to Des Moines; to do the necessary engineering; procure the right of way; do all grading; build necessary bridges and culverts; furnish the iron spikes, chairs and joints; lay and ballast the track; furnish and place all the ties; build necessary stations, depots, water-tanks, turn-tables and engine-houses build a telegraph, and furnish the road with rolling stock. And whilst the mortgage was not in terms made to him, yet it was made in trust for him and for the expressed and avowed purpose of raising the means to construct the road and to pay him the first mortgage bonds at the rate of $8,000 per mile. He was the beneficiary of the mortgage, and its legal effect is the same as though it had been made to him. Before the plaintiffs furnished a tie there was a binding contract made which the mortgage was intended to secure. Not only this, but the evidence shows that before that time Lane had actually expended more than $65,000 on behalf of the road.

When a mortgagee has bound himself to make advances or incur liabilities, such advances tack, and the mortgage, when recorded, is a valid lien for all the advances actually made, although they may have been made after notice of a subsequent mortgage or incumbrance of the property. See Lyle v. Duncomb, 5 Binney, 585; Wilson v. Russell, 13 Md. 495; Griffin v. Burnett, 4 Edr. Ch. 673; Moroney's Appeal, 24 Pa. State, 372; Crae v. Deming, 7 Conn. 386; also an article in 11 American Law Register (N. S.) 273, and authorities cited.

The mere fact that the bonds were not signed by the president, and delivered to the trustee and negotiated at the time the mortgage was recorded, can not operate to postpone the holders of the bonds to the lien of plaintiffs. The mortgage, which was upon record when plaintiffs furnished the ties, declares that it is executed to secure these bonds, which shall bear even date with mortgage and be ratably secured thereby. The bonds are payable to bearer, and are intended to be negotiated for the purpose of raising money to construct the road. If the purchaser of a bond in New York, in Amsterdam or London, is bound to enquire whether the bond in fact was executed by the company contomporaneously with the execution of the mortgage, or whether before the signing or the negotiating of the bonds, liens of laborers or material-men may not have attached to the road, it is apparent that the vulue of these securities would be much depreciated, and all industries which depend upon the raising of means through negotiation would be paralyzed. The plaintiffs are affected with knowledge of the existence of the mortgage, and seeing that the road had mortgaged all its futnre acquisitions, they could and should have protected themselves by refusing to sell the ties without payment or security.

It surely can not be claimed that the plaintiffs, in virtue of their lien, are in any better position than would be a second mortgagee of the road. Could such mortgagee claim priority over a holder of a bond secured by the first mortgage, but not negotiated until after the second mortgage was issued? It seems to us that to such person it would be said: "You saw the record of the prior mortgage, knew what it was given to secure; you voluntarily advanced your money, subject to the prior incumbrance, and you can not now be prefered to any part of it."

II. It is claimed that a mortgage, to cover after-acquired property, can attach itself to such property in the condition only in which it comes into the mortgagor's hands, and that whatever interest the mortgagee acquired is subject to the charges, incumbrances and liens then existing upon it. In the case of the U. S. v. New Orleans R. R., 12 Wallace, 362, the principle was recognized and applied to the sale of locomotives to a railroad which had made a mortgage to include after-acquired property. But in the case of the Galveston R. R. v. Cowdry, 11 Wallace, 459, its application was denied, under like circumstances, to a sale of railroad iron which had been placed in the track. The court held that the iron became a part of the road, and the mortgage upon the road took precedence over the lien of the vendor of the iron. It is true that in Texas, where this case arose, there was no mechanics' lien law in favor of those who supplied money or materials for the construction of railroads. But at the time of the purchase of the iron, it was expressly agreed that the seller should have a lien thereon for the price. This agreement places him in as good a position as he would have occupied under our mechanics' lien law.

In Gretchell and Tichnor v. Allen, 34 Iowa, 559, it was held that a mechanic's lien for work or material furnished in making add

tions or repairs to a building, is not entitled to preference as against the building, over a prior mortgage on the premises. In that case it was said: "After the improvements are made they do not remain separate and distinct from the building. They have lost their distinction; the house includes them. They are a part of the house, and as such included by the mortgage. For the reason that the mortgage binds the improvements as a part of the house, the mechanic's lien can not defeat the mortgagee's right." This case must be right upon principle; for otherwise the mortgagor might, at pleasure, by making extraordinary improvements, absorb and defeat the security of the mortgagee.

It is only when the improvement is of such a separate and distinct character that it is susceptible of removal from that which was before covered by an incumbrance or mortgage, that section 1855 of the revision (2141 of the code of 1873) applies. We have no doubt that a party who should erect a depot upon a railroad covered by a mortgage, might under our statute and decisions enforce his lien against it and cause it to be removed, if necessary. But railroad ties imbedded in the road bed, underneath the iron rails, spiked upon them, become as much a part of the road as the paint or plaster is a part of the house. They can not be removed without the destruction of the road or of the labor of others. And there would be no more reason for permitting the furnisher of ties to remove them from the road bed, than for allowing a stone mason to take the foundation from a house. Whenever the acquisition becomes so attached to the principal thing as to become a part of it, the prior mortgage fastens to it, and the lien of the mechanic or material-man is postponed to that of the mortgagee. This is the result of the decision in 11 Wallace, 459, and of our own decisions in Gretchell and Tichnor v. Allen, *supra*, and they are, it seems to us, based upon the soundest principle of law and reason.

III. The plaintiff asked that their mechanics' lien might be enforced against the iron, rail, ties, depots, rolling-stock and engine-house and turn-tables of the road. The court established their lien simply against the Iowa Eastern Railroad. Of this action the plaintiffs complain. Sec. 1846 of the revision provided that every mechanic, builder, artisan, workman, laborer, or other person who shall perform labor upon or furnish material for any building, erection or improvement upon land, including laborers engaged in the construction of railroads, shall have for his work or material a lien upon such building, erection or improvement upon land belonging to such owner or proprietor on which the same is situated, to secure the payment of such work or labor, or material, machinery or fixtures furnished. Section 1, ch. 12, laws 14th general assembly, provides that every owner, etc., shall be deemed to have the notice provided for by sec. 1847 of the revision of 1860 for a period of sixty days from the last day of the month in which the labor was done or material furnished, during which period any person who has performed labor or furnished material for a railroad may file a lien as provided in chapter 79 of the revision of 1860 and the amendments thereto, which shall be binding upon the erection, excavation, embankment, bridge, road-bed or right of way, and upon all lands on which the same may be situated. This subsequent provision we think was intended to define more fully and specifically the subjects and extent of the lien and not to effect a change in the principles under which it attaches. A person who labors upon a depot may have a lien upon the road, including its excavations, rails, ties, embankments, etc., and, under certain circumstances, a lien, which he may enforce against the building upon which he works, to the extent of effecting its removal if necessary; but for labor performed upon one depot he could not remove one upon which he did not work. So the plaintiff in this case, we think, can not enforce his lien for ties specifically against the iron, the depots, the rolling-stock, the turn-tables, for he furnished no labor nor material toward their production. His lien is a general one upon the road or a specific one upon the ties, if they were in a condition that he could remove them.

We are of opinion that the judgment of the court below was right and that it must be AFFIRMED.

Railway Regulation — Action under the Illinois Statute against Extortion and Unjust Discrimination—Necessary Averments.

THE CHICAGO, BURLINGTON AND QUINCY R. R. CO. v. THE PEOPLE.

Supreme Court of Illinois, Opinion filed October, 4, 1875.

Hon. PINCKNEY H. WALKER, Chief Justice.
" SIDNEY BREESE,
" A. M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" BENJ. R. SHELDON,
" WM. R. MCALLISTER, } Asssociate Justices.

1. **Action for Railway Extortion—Necessary Averments.**—It an action against a railway company for extortion, under the Illinois act of May 2, 1873, to prevent extortion and unjust discrimination in the rates and freight on railroads, etc., it is necessary to aver that a schedule of reasonable rates of charges for the transportation of passengers and freight had been established, as provided for by the eighth section of the act, and that the defendant had demanded and received compensation in excess thereof. Walker, Ch. J., and Scholfield, J., dissenting. Scott and McAllister, JJ., concurring specially.

2. **Action for Unjust Discrimination—Necessary Averments.**—In an action under the same statute for unjust discrimination, it is necessary to aver that the freights for which a greater rate of freight was charged were "of like quantity of the same class" as those for which a less rate was charged. Walker, Ch. J., and Scholfield, J., dissenting. Scott and McAllister, JJ., concurring specially.

SHELDON, J.—This was an action of debt, brought to recover penalties under the act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freight on railroads in this state, etc., approved May 2, 1873. The suit was commenced May 21, 1874. The declaration contained twenty counts, the first nineteen of which were for extortion and the twentieth one for unjust discrimination. The defendant pleaded three special pleas, to which a demurrer was sustained, and the defendant elected to abide by the pleas. The court—a jury being waived—heard the evidence and fixed the penalty for a violation of the statute at $1,000, and gave judgment therefor, from which the defendant brings this appeal.

I. It is urged that the court below erred in not carrying back the demurrer and sustaining it to the declaration. Appellant insists that the declaration is defective in not averring that a schedule of reasonable rates of charges for the transportation of passengers and freight had been established as provided for by the eighth section of the act, and that the defendant had demanded and received compensation in excess thereof.

The statute provides in section one, that "if any railroad corporation in this state shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight, etc., the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided;" and in section two, that "if any such railroad corporation shall make any unjust discrimination in its rate of charges of toll or compensation for the transportation of passengers or freight, etc., the same shall be deemed guilty of having violated the provisions of the act, and, upon conviction, shall be treated as thereinafter provided." Section four prescribes that "any such railroad corporation, guilty of extortion or of making any unjust discrimination as to passenger or freight rates, etc., shall, upon conviction thereof, be fined in any sum not less than one thousand dollars, nor more than five thousand dollars for the first offence, and for the second offence not less than five thousand dollars nor more than ten thousand dollars, and for the third offence not less than ten thousand dollars nor more than twenty thousand dollars, and for every subsequent offence, on conviction thereof, shall be liable to a fine of twenty five thousand dollars."

Section eight directs the railroad and warehouse commissioners

to "make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars on each of said railroads, and said schedule shall, in all suits brought against any such railroad corporation, wherein is in any way involved the charges of any such corporation for the transporation of any passenger, or freight, or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as *prima facie* evidence that the rates therein fixed are reasonable maximum rates or charges for the transportation of passengers and freights and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules. When any schedules shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for three consecutive weeks in some public newspaper published in the city of Springfield, in this state; provided that the schedules thus prepared shall not be *prima facie* evidence as herein provided, until schedules shall have been prepared and published as aforesaid for all the railroad companies now organized under the laws of this state, and until the 15th day of January, A. D., 1874, or until ten days after the meeting of the next session of this general assembly; provided a session of the general assembly shall be held previous to the 15th day of January aforesaid."

The charge of the offences in the declaration is in general form. The language in one of the counts which, in this respect, is a fair specimen, averring that the sum charged "exceeded a fair and reasonable rate of toll and compensation for the carriage of the goods, in the sum of one dollar and ninety-one cents, and was then and there unjust, unfair, unreasonable and extortionate, contrary to the form of the statute," etc. Looking merely at the first section of the statute, the declaration would seem to describe the statutory offence. That section by itself makes the offence to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case it may be seen, different persons would have differentt opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which in another place or at another time would be held to be no breach of the law, and which might be thought a fair and reasonable rate on one road, but might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with the purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed.

The statute furnishes evidence that it did not intend to leave the railroad companies in this state of uncertainty and danger, and exposed to such seeming injustice. We must look to the entire statute, and to every part and provision of it, to learn in what the offence is really made to consist. The eighth section provides how reasonable rates shall be ascertained; what they shall be; that the railroad and warehouse commissioners should make for each of the railroad companies in the state a schedule of reasonable maximum rates, thus furnishing a uniform rate for the guidance of railroad companies. When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed. The careful provision made by the statute for the publication in a public newspaper for a certain length of time of the schedules when made, and that until so published they should not be such *prima facie* evidence, indicates, as we may suppose, the legislative intention that the railroad companies should have fair notice of the schedule of rates, and so have the opportunity afforded to them of being able to conform thereto. The provision, too, that the schedule of rates is to be made for each of the railroad corporations in the state, is another indication in the same direction.

We are of the opinion, from an examination of all the provisions of the statute, taken together, that a disregard of the schedule of rates to be prepared by the railroad and warehouse commissioners, is a necessary element of the offence against which the statute is directed; that it is the charging more than the maximum rates fixed by said board of commissioners which makes the company guilty of extortion. Under the statute, in its true intent and meaning, we can not think that until this schedule of rates was made by the board of commissioners, there would, under the statute, be incurred a liability for unreasonable and extortionate charges, nor that, when made, for taking the rates made by the schedules, or less rates, the statutory penalties would be incurred, even though proof might be made that the rates so taken were more than fair and reasonable rates. Yet, in such last case, according to the terms of the first section of the statute, and the interpretation put upon the act by the appellee, there would have been a commission of the statutory offence, as there would have been the taking of more than fair and reasonable rates. The evident purpose was to regulate and fix, so far as the legislature might, the rates of railroad charges, and to punish the taking in excess of the fixed rates; and the form of the provision making the the schedule of rates *prima facie* evidence of what were reasonable maximum rates, was doubtless to avoid the objection indicated in the opinion in C. and A. R. R. Co. v. The People, 67 Ills. 13, to the legislature making any fixed rates conclusive of what was reasonable, and to follow what was inferable from that opinion, they should be made but *prima facie* evidence. It is true that the taking of higher rates than those fixed by the commissioners' schedule of rates, is not the exact form of the statutory offence, and the taking of such higher rates might not subject to the penalties of the statute, upon making of proof that they were fair and reasonable; still, as we view it, to constitute the offence really designed and intended by the statute, regarding it in its whole scope and purpose, the rates taken must have been in excess of the schedule rates. It was not enough, then, we think, to bring the case fully within the provisions of the statute, that the rates charged were simply unreasonable and extortionate, but they should have been so according to the rule of reasonableness to be prescribed under the statute; and we are of the opinion that the declaration in this respect was defective, in not averring that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates.

We think what already has been said sufficiently meets the position taken by appellee, that the statutory offence consists simply in receiving more than a fair and reasonable rate of compensation, and that the schedule of rates is but *prima facie* evidence of what is reasonable, and that it is not necessary for a party to plead evidence. In the view taken the schedule of rates is something more than evidence; it is the fact upon which the action rests. Under the constitutional provision, the statute would go into effect July 1, 1873, and so from that date, the first and fourth sections prohibiting and imposing penalties for extortion be in force; but the eighth section provided that the schedule of rates could not be used as *prima facie* evidence until the 15th day of January, 1874; and appellee's counsel made a point upon this, as evincing that the existence of the schedules of rates was not essential to the commission of the offence of extortion under the act. But we can view this as but an accidental incongruity in the respect named, not entitled to such serious regard as to be of controlling force in determining the true construction of the statute.

II. But it is insisted on the part of the appellee that there is at least one good count, the twentieth, that which declares for unjust discrimination. The charge in the count is that defendant made an unjust discrimination in its rates and charges of toll and

compensation of freight from Quincy to Macomb, in this: "That the defendant on the 11th of April, 1874, transported for James T. Applegate and Samuel Dodd, from Quincy to Macomb, one car load of horses, commonly called ponies, a distance of fifty-nine miles, charging therefor the sum of $28.34, being at the rate of 48 cents per mile, and that said defendant, on the 30th day of March, 1874, transported from Macomb to Chicago, a distance of 204 miles, for Robert Smithers and James Robinson, one car-load of horses, charging therefor only the sum of $55.25, being at the rate of 27 cents per mile for the carriage of said car-load of horses, contrary to the form of the statute," etc.

The statute defines in section three in respect to unjust discrimination, as it provides in section eight in respect to reasonable rates, what shall be deemed and taken as *prima facie* evidence of the unjust discriminations prohibited by the act. The language of the section in respect to freight is, "charging a greater amount of compensation for any distance than is at the same time charged for the transportation in the same direction of any passenger or like quality of freight of the same class over a greater distance of the same railroad." This count, we think, does not present a state of facts which shows a violation of the statute, in that there is no averment as to the respective freights being of "like quantity of the same class;" that in respect of such freight, there was a higher charge for a less than for a greater distance. There is no averment whatever upon this head, either in respect of the numbers of the respective animals or their weight, or the size or class of the cars containing them or otherwise. The section itself recognizes the fact of there being railroad cars of different classes and numbers, for in defining unjust discrimination in respect to cars it provides that they be of the "same class or number." The description of the respective freights merely as one car-load of ponies and one car-load of horses does not, in our view, sufficiently show them to be "like quantities of freight of the same class."

The rule applicable to the enforcement of penal statutes require that it should be made clearly to appear that the precise statutory offence has been committed. Being of the opinion that the demurrer should have been carried back and sustained to the declaration instead of to the pleas, the judgment will be reversed.

Dissenting opinion of SCOTT & MCALLISTER, JJ.—We concur in reversing the judgment in this cause, but dissent from the reasoning of the opinion of the majority of the court, especially so far as it may be said to assume the constitutionality of the act under discussion. As the majority of the court have avoided any discussion of the real merits of the case, we do not deem it necessary to express our views at length,

WALKER, Ch. J., and SCHOLFIELD, J.—We hold that the first, second and third sections of the act create complete offences independent of the eighth section; that the fourth section imposes penalties for their violation; that the eighth section only provides a rule of evidence on the trial for the recovery of the penalty. Whether that section was valid and has changed the rule, does not, as we think, arise on the pleadings, and can only be presented for decision when the schedules provided for by it shall be offered in evidence. We hold that the averments contained in the twentieth count show a violation of a second and third sections of the act, and that it is good. Those sections define the defence of unjust discrimination, and the averments show that the offence was committed. The pleas fail to present a defence to the charge of unjust discrimination for the use of the cars, and the statute has declared that the facts stated in this count *prima facie* constitute an unjust discrimination, and the statute is warranted under the decision in the case of the Chicago and Alton Railroad Co. v. The People (67 Ills.), where it was held that the general assembly have the power to declare that the facts averred in the count shall be held *prima facie* evidence of unjust discrimination, leaving the company to overcome the presumption. In this case there was no evidence to rebut the presumption, but on the contrary the demurrer admits the facts, and we think the judgment should be affirmed under the twentieth count in the declaration. But we refrain from the expression of any opinion as to what, if any, change of the rules of evidence has been made by the eighth section of the act, as that question does not arise on this record. The want of time prevents us from presenting our views in a more extended form.

Book Notice.

WITHROW & STILES' DIGEST OF THE DECISIONS OF THE IOWA SUPREME COURT. VOL. II. E. B. MYERS: CHICAGO. 1875.

The second and last volume of this much needed and valuable work, bringing down the decisions of the Supreme Court of Iowa from its organization to the present time, or in other words, embracing all the decisions from Morris to 35th Iowa, accompanied with reference to the statutes, is before us. What we thought of the work and the manner of its execution we said on the appearance of the first volume. The editors were the successive reporters of the court, and proved themselves excellent reporters. The decisions of the Iowa Supreme Court have deservedly a high reputation, and the influence of Iowa legislation and laws has been largely felt in the adjoining states. These circumstances combine to make such a digest as we have here valuable to the profession. Such a work has been much needed by those who have the Iowa reports, as Dillon's and Hammond's digests have been long out of print, and are ten years behind the reports. J. F. D.

Correspondence.

THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

EDITORS CENTRAL LAW JOURNAL:—Allow me through your paper to call attention to the 3d section of the act of Congress of the last session, entitled "An act to facilitate the disposition of cases in the Supreme Court of the United States and for other purposes." Page 316 of laws of last session. That section is as follows: "That whenever by the law now in force it is required that the matter in dispute shall exceed the sum or value of two thousand dollars, exclusive of costs, in order that the judgment and decree of the circuit courts of the United States may be re-examined in the supreme court, such judgments and decrees, hereafter rendered, shall not be re-examined in the supreme court unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs." The words "matter in dispute" in that section, I suppose to mean the amount of money or the value of the property sued for, and therefore in actions for interest upon coupon bonds or notes, unless the amount of the coupons sued on exceeds five thousand dollars, no review of the judgment recovered can be had in the supreme court. This allows the validity of a very large amount of such bonds or notes to be determined in an action in the circuit court without any right of review. Suppose A. holds $100,000 in bonds against B., all of one issue, with coupons attached, for the payment of the interest at seven per cent. per annum, payable semi-annually. At the end of the first half year, he sues B. for his first instalment of interest, $3,500; B. defends, and a judgment is rendered. Whether the judgment be for plaintiff or defendant, I suppose the validity or invalidity of the whole of that issue of bonds is judicially established by it, and without any right of review in the supreme court. This class of commercial paper furnishes a very large proportion of the litigation in the federal courts in the west, and part of that litigation seems likely, under the present law, to be determined without any right of review, and in suits in which the "matter in dispute" is less than five thousand dollars, but the matter to be determined very large. Ought not this defect in the law (for such I think it must be conceded to be), to be corrected at the earliest practical period? K. O. B.

COMMENTS.—This is only one of the serious defects of the federal judiciary system. The defect pointed out by our correspondent existed when the mimimum limit of jurisdiction was two thousand dollars, and has not been created, but only aggravated, by the recent law. Nothing could be more unsatisfactory than a system which gives to a single judge the power to dispose finally of all controversies less than five thousand dollars in value. In such cases the judge may act arbitrarily; may give way to infirm or quaint conceits; may even defy both law and justice, and the suitor has absolutely no redress. Nor is he entitled to a writ of error, even where life is at stake. Even cases subject to be reviewed in the supreme court can only be reviewed on naked questions of law. The jury may decide maliciously and in utter defiance of the proofs; and if the presiding judge refuses to set aside the verdict, there is an end of it. It is true that, as a general rule, the inferior federal judges exercise the great powers thus given them in such a manner as not to excite complaint of injustice or oppression; but this is not always so. There have been of late years some unfortunate appointments to the federal bench,

It is the mere possibility that life, liberty and property may be left to the *final* decision of a prejudiced, corrupt or ignorant judge, that creates the alarm. In a country whose laws place these great interests in the single keeping of a Busteed, a Durell or a McKean, is not our boast of liberty a mockery and a fraud?

Briefs.

Specific Performance—Town Subscription to R ilroad.—Perkins v. Town of Port Washington *et al*, Supreme Court of Wisconsin. Brief for defendants, appellants, pp. 43. It is alleged that the town subscribed a certain sum to a railroad, and specific performance is required in equity. Appellants say, respondent's remedy is *mandamus*, hence equity will not interfere; the town has no power to issue bonds unless specially authorized; the charter of the company made this power depend on a certain election by the town's people; the town officers acted *ultra vires*, the particular election was unauthorized, and its notice insufficient; the railway has changed its name since the election, and the objects of its incorporation have changed; the election was controlled by bribery; and then the appellants throw themselves upon the court. [Address Messrs. Smith & Stark, Milwaukee, Wis.]

Estate of Executors in Land held under Will.—Bell's Adm'r, v. Humphrey. Supreme Court of Appeals of West Virginia. Brief for plaintiff in error, pp. 18. Bell during his life brought action in ejectment against one Marlow for the land in question, and recovered, but sheriff failed to execute writs of possession. Bell's daughters and heirs agreed to convey their interest in the land to one Little, by whom it came to defendant. Bell's daughters received only nominal consideration from Little, and as they were rightful heirs, and the plaintiff was their trustee, this action was brought to recover the land. [Address William Erskine, Esq., Wheeling, W. Va.]

Dower.—Kendall v. Kendall *et al*. Supreme Court of Iowa. Brief for plaintiff and appellee, pp. 6. Two points enter into consideration, dower at common law, and under the dower law of 1862. Claimed to be the same in each instance. [Address W. E. Blake, Esq., Burlington, Iowa.]

Action of Deceit against a Corporation.—Weckler v. First National Bank of Hagerstown. Court of Appeals of Maryland. Brief for appellee, pp. 6. It is claimed that defendant, appellee, is liable because of misrepresentations as to value of railroad stock on the part of defendant's teller. On the other hand appellee urges that action of deceit does not lie against a corporation in its corporate capacity; and that sale of such stock is not a part of its regular business. [Address Albert Small, Esq., Hagerstown, Md.]

Vote of Money to Railroad by Township.—Springfield and Illinois S. E. R. R. Co. v. Supervisors of Barnhill *et al*. Supreme Court of Illinois; mandamus; petition for re-hearing, pp. 7. Barnhill appears to have voted aid to said road, which it now refuses to pay because the election was illegal, and because the road had changed its name. This is the same old story, and plaintiff is seemingly right. [Address H. Tompkins, Esq., St. Louis, Mo.]

Idem.—Cutter & Co. v. Tamaroa. Circuit Court of United States. Brief for plaintiffs, pp. 11. This case is practically like that immediately above. [Address the same attorney.]

Indemnity—Promissory Note—Statute of Frauds.—Vogel v. Melms. Supreme Court of Wisconsin. Case for defendant, pp. 20, and argument, pp. 22. William Melms had a contract, to carry out which, his brother, the defendant, lent him aid. Plaintiff also assisted William by endorsing his note, which plaintiff afterwards paid, relying, as he claims, on the promise of defendant to make good the payment. Defendant says the endorsement was for account of his brother, who alone is liable. The Statute of Frauds is thought to apply in bar of plaintiff's demand. [Address Messrs. Smith & Stark, Milwaukee, Wis.]

Deed of Trust—Machinery—Fixtures.—Ottumwa Woolen Mill Co. v. Hawley *et al*. In Supreme Court of Iowa. Brief for defendants and appellants, pp. 23. Quinn, owner of mill, gave a deed of trust, which was assigned to defendants. He afterwards sold one-third of said mill to King. Defendants sold out the mill under their trust deed, and claimed the machinery as part of the realty. In action by plaintiffs in court below they recovered. [Address H. B. Hendershott, Esq., Ottumwa, Iowa.]

Presumption of Grant in Absence of Deed.—Stephens v. Norris; in the Supreme Court of Texas. Brief for plaintiff and appellant, pp. 32. The plaintiff rests his claim to certain land on a "presumption of grant," declaring that said land was granted to his ancestor by the proper authorities of the government having the eminent domain of Texas; that said ancestor went into possession in 1806, remaining in possession under claim of title till his death, since which event his heirs have held it in unbroken chain. The doctrine of presumption, properly applied to incorporeal hereditament, is urged as applicable to corporeal as well. [Address Peyton F. Edwards, Esq., Nacogdoches, Texas.]

Legal News and Notes.

—THERE was recently a suit brought in the County Court of Logansport, Indiana, for the value of two hogs, where the costs amounted to more than two thousand dollars.

—JUDGE CYRUS WRIGHT, of Shelbyville, Ind., an honored citizen and the oldest member of the Shelby county bar, died on the 22d of last month, and was buried under Masonic auspices.

—JUDGE BOREMAN, of the Territorial Supreme Court of Utah, has enforced the old order of Chief Justice McKean, awarding alimony and sustenance in the Young divorce suit, and President Brigham, having failed to pay the sum accrued against him, namely, $9,500, is now in the custody of the marshal.

—ON NOVEMBER 1st an alteration in the pay-roll of British judges went into effect. The existing Lord Justices will be paid £6,000, and the future ones £5,000. The Lord High Chancellor will receive £6,000 for the special duties of his office, and an addition of £4,000 as Speaker of the House of Lords. To the Lord Chief Justice of England £8,000 will be paid, to the Master of the Rolls £6,000, and the Chief Justice of the Common Pleas and Chief Baron of the Exchequer, £7,000 each.

—HON. ALEXANDER S. JOHNSON, of Utica, New York, has been commissioned by the President, U. S. Circuit Judge, to fill the vacancy caused by the death of Judge Woodruff. Judge Johnson is fifty-seven years old, studied law in Utica, where he practiced his profession until he was elected a judge of the court of appeals in 1852. He then lived in Albany for eight years—the time he held that position. In 1873 Governor Dix appointed him commissioner of appeals to fill a vacancy caused by the resignation of Judge Hunt, and the same year he was made judge of the court of appeals in place of Judge Peckham, deceased. His term to the latter position expired last December.

—A MAN and wife have recently been convicted of murder by procurement of malpractice resulting in death, at Toronto, Canada. This was a remarkable case of circumstantial evidence. On the 31st of last July a pine box containing the nude body of a young woman was found, which, though with difficulty, was identified as that of Miss Gilmour. The New York Herald correspondent, speaking of the evidence, says: "The medical testimony was, as usual, somewhat contradictory, but, in general, it tended to show that mechanical appliances had been the cause of death. It would appear that the intention of the parties had been to bury the body in the sand pits near where it was found, but having been frightened by a man discharging a pistol on his way home—he having just purchased it and wished to test it—they had to leave their work unfinished. Another circumstance which, being added to others, apparently trifling, but forming links in a continuous chain, brought the crime home to the guilty parties, was that nothing was placed with the corpse in the box, but some broken straw, and some exactly the same was found scattered around on the floor and in an open mattress in the room of the prisoners, they not having had time to remove these and other evidences of guilt before arrest. Articles of wearing apparel and jewelry belonging to deceased were also found, apparently secreted in a hurry, not far from Davis's house. These and very many other coincidences came out during the trial, making altogether one of the most remarkable cases of circumstantial evidence in the annals of Canadian crime."

—THE BROOKLYN EVENING EAGLE is responsible for the following: Christina Seifert, a German oddity, with a face very red and very freckled, came before Judge Semler to-day, and swore that she had been abandoned by her husband, Frederick Seifert. Frederick, hapless wight, was placed at the bar to answer. He is a cripple and blind—to which misfortune he added a matrimonial alliance with Christina about two years ago. Before wedlock they arranged specifically the terms of the marriage contract. The covenants assumed by the wife, Frederick states, were that she should do the work of the household and support her husband whenever he might be unable to support himself by his "profession"—that of guitarist in the neighboring lager beer saloons. Frederick added that his branch of business of late became unremunerative, and just as soon as his receipts diminished, his wife's amiability disappeared, until at length the house got too hot for him, when, with his "light guitar" beneath his arms, he sallied forth to brave the storms of life, alone, for the second time in history. After Christina heard these statements of her truant lord, she turned up her quaint, freckled face at his honor, and coolly asked the magistrate whether he ever heard "of a voomans dat does all for her mans, and he does notinks?" The court required time to ponder the question, and adjourned the proceedings until November.